RECEIVED
JUN - 1 19
SUPREME COURT

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Appellant,

against

JAMES S. PHELPS and FIDELITY TRUST AND SAFETY VAULT COMPANY.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

PETITION FOR A REHEARING.

(18437)

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant,*

vs.

JAMES S. PHELPS AND FIDELITY TRUST AND SAFETY VAULT COMPANY, . . *Appellees.*

Notice.

Appellees, James S. Phelps and Fidelity Trust and Safety Vault Company, will take notice that appellant will on Monday, June 1, at the Court Room of the United States Supreme Court at Washington, D. C., file a petition for a rehearing of the decision made in this case on the 18th day of May, A. D. 1903, of which petition a copy is hereto attached.

EDMUND F. TRABUE,
Counsel for Appellant.

Service made on Counsel May 28, 1903.

18437

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appellant*,
vs.
JAMES S. PHELPS AND FIDELITY TRUST & SAFETY VAULT COMPANY, . . *Appellees*.

Appeal from the Circuit Court of Appeals for the Sixth Circuit.

PETITION FOR REHEARING.

After a decision from this court we should not ask a rehearing, however important to ourselves the case decided, if the points involved were not of so general importance.

The decision is confined substantially to two points:

1. That service upon the Insurance Commissioner is effectual for all purposes; and

2. That no summons was necessary in the Receivership proceeding.

The first point is of paramount importance to most foreign insurance companies now doing business in

Kentucky. The Kentucky decisions cited in the opinion, *viz.: Home, etc., of New York v. Muehl, 59 S. W. 520; 22 Ky. L. R. 1378*, and *Germania, etc., Co. v. Ashby, 23 Ky. L. R. 1564*, are very recent and made long since contracts of the insurance companies with the State for accepting service were made, as in the instant case. *E contra, Friedman v. Empire Co., 101 Fed. 535*, opinion by Judge Barr, and *Swann v. Mut. Res. Fund L. A., 100 Fed. 922*, an able opinion by Judge Evans following the decision of Judge Barr, were made prior to the announcement of the Kentucky Court in the Home Benefit case, and many insurance companies have doubtless accepted the statute as construed by those judges.

With great deference we submit that although the Kentucky Appellate Court's construction of the Kentucky Statute would have been controlling had the decision been made before our contract was made, its subsequent decision cannot vary our contract. That the Statute is a part of the contract for service, the State a party to the contract, and that the State cannot vary the contract *ad libitum* by the device of construing the Statute. That when we appeal to this court on the question of due process it will construe the Statute as freely as in cases where it is claimed here that the plaintiff's contract has been impaired by a State Statute. In

such cases this court will not permit the State Court to determine either that there was no contract, or that the offending Statute does not impair it. *Houston &c. Co. v. Texas, 177 U. S. 77; Stearns v. Minn., 179 U. S. 223, etc., etc.*

We submit that the State Court did not construe the Statute, but simply amended it by judicial legislation. The Statute did not provide simply for service in actions brought by *Kentucky policyholders* accepting policies while the company was transacting business in the State, but provided for service "*in any action brought or pending in this State.*" *Ergo*, the Statute, by its terms, would cover any action by any citizen of New York brought in a Kentucky court. The Statute, according to the Kentucky court, would hold the foreign corporation to defend in Kentucky forever. There is no hope of release until the last policyholder die. If the foreign company consented so to be bound only its own folly is blameable, but if the Statute provides no such consent, can the State court require it by misconstruing the Statute, such construction post-dating the contract?

In *Friedman case* Judge Barr found that the alternative confronted him either to confine liability to service to the time of transacting business in Kentucky or to extend it forever, and that such extension was inadmis-

sible under the statute. His review of the statute was painstaking, and his reasoning, as usual, was able.

In *Swann v. Mutual, etc., Assn.* the Court ably demonstrated the injustice to the Association of holding it bound to rely upon receipt from a hostile commissioner, of summons served upon him. To quote from these elaborate opinions would only mar the argument therein contained.

Under the principle lately announced by this Court in *James, U. S. Marshal v. Bowman* (decided May 4, 1903), construing *Secs. 5507* and *5508*, this Court, following the trade-mark cases, *100 U. S. 82*, and Income Tax Case, *158 U. S. 635*, holding that although Congress might have enacted a statute confined to Federal elections which would have been valid nevertheless, as the statute was too broad and applied to elections generally, it was unconstitutional; that the statute could not be made constitutional by so construing it as to limit it to the field to which Congress had the right to limit it, the Kentucky Court should have held *Sec. 631* aforesaid to cover, as the statute declared "any action brought or pending in this State," and should not have attempted to vitalize it by confining it to actions by Kentucky policyholders contracting in Kentucky with the company while transacting business here. The Kentucky Court's decision is in conflict

with the principle announced by this Court in *U. S. v. Bowman.*

Accordingly, with great respect, we submit that this court should apply the principle of *U. S. v. Bowman* to the *instant* case and hold *Sec. 631* to cover, as it provides, "any action brought or pending in this State" (of Kentucky), and accordingly to operate only so long as the Company transacted business in Kentucky.

II.

If, however, the first point be still held against us, we submit, with great deference, that the Receivership proceeding is essentially different from the interpretation thereof in the opinion. This Court says:

> "It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment."

If so, it would be appealable or non-appealable, as the amount involved in the original action might determine. Nevertheless, it is the amount in the equitable action upon a return of *nulla bona* upon a *fi. fa.* which determines appellate jurisdiction, *Nashville, &c. Co. v. Mattingly 19 Ky. L. R. 373.* The determination in that case was that the amount involved in the equitable

action determined appellate jurisdiction. Thus it is demonstrated that the equitable action is independent. But this is equally demonstrable from a review of the Statutes involved.

Kentucky practice is statutory. There is no pleading admissible in Kentucky except as provided by the Code of Practice. Under that code no petition or amended petition can be prosecuted without summons, except an amended petition to perfect a cause of action alleged in the petition. Such amended petition is necessarily filed before judgment, and if it state a new cause of action summons is indispensable. Without summons a judgment upon it is void.

After judgment only execution is admissible, no pleading is possible. *Brown v. Van Cleave, 86 Ky. 381; Meadows v. Goff, 90 Ky. 540.* The only execution of a judgment *in personam* is a *fi. fa.; Ky. Stats. Sec. 1650.* Nor is any action upon a judgment admissible except an equitable action authorized by *Sec. 439 Civil Code; Davidson v. Simmons, 11 Bush, 333.*

After *60 days* following a judgment the Court's control over the judgment expires; *Act of Dec. 30, 1892, Sec. 5, p. 419,* providing:

> "The court shall have control over its judgments for sixty days as Circuit Courts have over their judgments during the term in which they are rendered."

It is even held in Kentucky, *Louisville, &c. Co. v. Kerr, 79 Ky. 12,* that the Court after sixty days has no jurisdiction to rehear a motion for a new trial.

See also *Elder v. Richmond, &c. Co., 56 Fed. Rep. 536; Mueller v. Ehlers, 91 U. S. 249, etc.*

As pleadings were inadmissible in the action, nothing was admissible after judgment except execution. The only execution at common law was *fi. fa. Ky. Stats., Sec. 1650;* and the only action "*an equitable action*" under *Sec. 439 Civil Code*, as aforesaid:

> "After an execution of *fieri facias*, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants." *Sec. 439.*
>
> "An action is commenced by filing in the office of the clerk of the proper court a petition stating the plaintiff's cause of action, etc., 'and in either case by causing a summons to be issued or a warning order to be made thereon.'" *Civil Code, Sec. 39.*
>
> "An action upon a return of no property found, pursuant to Section 439, must be brought in the county

in which the judgment is rendered, or in which the defendant resides or is summoned." *Civil Code, Sec. 70.*

"A lien shall be created on the property of the defendant (in action under Section 439) by levy of the attachment, or by service of the summons with the object of the action endorsed thereon on the person holding or controlling his property." *Sec. 442.*

We are consequently, not left to questions of practice, but provided with express statutory requirement absolutely complete, of an "equitable action" to be "instituted" upon a return of *nulla bona* upon a *fi. fa.* It thus appears that the action is to be "instituted," *i. e.*, summons is to be issued. That until summons issued no action is commenced. That an attachment may be procured by *endorsement* upon the *summons.* That the action may be brought in the county wherein the judgment was rendered, or any county where the defendant *resided* or was *summoned.*

Due process is process according to State law, and if statutory, State Statute. This statutory procedure *requires* summons. Procedure, therefore, without summons is denial of due process. *Pennoyer v. Neff, 95 U. S.* When the term ended the judgment became final and defendant was out of court except as to its property liable to levy under a *fi. fa.* It was also liable to be again brought into court in an "equitable action" under Sec. 439, by service of a *summons.* There was

no service and no summons, hence the United States Circuit Judge held the proceedings a nullity.

The *nisi prius* State Judge, after judgment and term ended, accepted the supplemental petition in the form of a petition under Sec. 439 without summons, and immediately appointed a Receiver. He could not handle it in the common law action. He did not even assume so to do. He assumed to transfer it "to the equity docket," *Rec. p. 22.* This was because it was, if anything, a petition *instituting* "an equitable action." If so, summons was indispensable; *Sec. 39.* Until summons is issued an attachment previously issued is void. Any order whatever before summons is void. A sale under an attachment before summons is anullity, and passes no title. *Hall v. Crogan, 78 Ky. 11; Kellar v. Stanley, 86 Ky. 240; Redwine v. Underwood, 101 Ky. 91.* (Even an order upon an amended petition before judgment, asserting a new cause of action, is void. *Cecil v. Sowards, 10 Bush, 96; Cope v. Slayden, 24 Ky. L. R. 1735 (Feb. 24, 1903).*

In *Hall vs. Crogan*, the court, holding an attachment issued before summons *void*, said:

> "The question raised in this case is, can an attachment issue before the summons? We see no escape from the conclusion reached by the court below.

"The plaintiff may, at or after the commencement of an action, have an attachment, and not before. An action is commenced by filing in the clerk's office the petition and causing a summons to be issued or a warning order made. (Secs. 39, 194, Civil Code.) There is no *lis pendens* until a summons is issued or a warning order made, and the provisions of the General Statutes are not in conflict with this view of the case; and if such were the case, the provisions of the code of practice must control."

In *Kellar v. Stanley*, the court said:

"It seems to us the paper issued by the Clerk in this instance as a summons can not be regarded as such, but is fatally defective.

"As, therefore, there was neither a summons nor warning order against the defendants when the attachment was issued, it must, in obedience to the clear requirements of the Code, and following the case of *Hall vs. Crogan*, be held void. And being so, the Court had no jurisdiction of the subject of the action, and the judgment and sale under it of the lot in question conferred no title apon Fillion, the vendor of appellants."

The device of assumption to transfer to equity was a farce. The Statute provides only for transfer before judgment; *Civil Code, Sec. 10.* The transfer is on motion of defendant *when* or *before* he answers; *Sub-Sec. 2*, or by the court before judgment, *Sub-Sec. 3*, as follows:

"2. The defendant, by motion made when or before he answers, may have an ordinary action transferred to the equity docket, if, according to the provisions of section six, it should have been an equitable action.

"3. The court may, without motion, order the transfer of an action from one docket to another if either party be entitled to such transfer; or may try the action, or render judgment therein by default, unless a party entitled to a transfer move therefor."

Appellee Phelps was therefore confronted with this dilemma, that the statute provided for transfer to equity before judgment, and nevertheless judgment had been rendered at a previous term. That an equitable action under *Sec. 439* could not be commenced without issuing summons. This was the State of Kentucky law. The statutes are unquestionable.

Wells v. Deposit Bank, 18 Ky. L. R. 156, and *Caldwell v. Same, 22 Ky. L. R. 684*, cited in the opinion, are distinguishable by reference to *Sec. 428, Ky. Code*. Those cases sprung out of incidental controversies arising in the settlement of a decedent's estate. The claims involved were not susceptible of prosecution in separate actions. By *Sec. 436* an injunction against the prosecution of any other action was provided. The judgment upon which the *fi. fa.* was returned *nulla bona* was rendered *against decedent in the settlement suit*. The claimant was not at liberty to institute an independent suit under *Sec. 439*, but required to litigate his claim in the settlement suit, so that the decedent's estate might be settled. The question now presented was not raised, and as the bank's

petition was dismissed there was no adjudication in favor of such a proceeding; *e contra*, any question raised by the bank would have been considered as determined against it.

It is submitted that *Laing v. Rigney, 160 U. S. 531*, is distinguishable. The question of necessity of a subpoena upon a supplemental bill in that case was a question of fact determinable by New Jersey practice. Defendant introduced expert testimony and prevailed in New York courts. This court reversed the *finding of fact*, determining simply that no subpoena was necessary under New Jersey practice. The supplemental bill in the New Jersey case was filed before decree. As defendant was in court by service of subpoena on the original bill the question involved was simply a question of State practice. If that practice required defendant to take notice of every supplemental petition he was bound to do so. The question would have been decided differently in Kentucky: *Cecil v. Sowards and Cope v. Slayden, supra.*

With great deference we submit this petition.

EDMUND F. TRABUE,

Of Counsel.

CERTIFICATE.

Edmund F. Trabue certifies that he is of counsel for appellant in this case and that in his opinion this petition is well founded in point of law, and further certifies that it is not filed or interposed for delay.

EDMUND F. TRABUE.